

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481-rdd

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In the matter of:

DPH HOLDINGS CORP., et al.,

Reorganized Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

April 1, 2010

10:44 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

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HEARING re Reorganized Debtors' Emergency Motion for Order
Under Section 105(a) of the Bankruptcy Code, Fed. R. Bankr. P.
7004(a) and 9006(b)(1) and Fed. R. Civ. P. 4(m) Extending
Deadline to Serve Process for Certain Avoidance Actions

Transcribed by: Lisa Bar-Leib

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BY: RALPH E. MCDOWELL, ESQ.
(TELEPHONICALLY)

1 P R O C E E D I N G S

2 THE COURT: All right. Let's go ahead with the
3 Delphi.

4 MR. FISHER: Your Honor, Eric Fisher from Butzel Long
5 for DPH Holdings Corp. And I'm here today with Daniel
6 Geoghan --

7 MR. GEOGHAN: Daniel Geoghan from Togut, Segal &
8 Segal also here on behalf of DPH Holdings Corp.

9 THE COURT: Okay.

10 MS. CALTON: Judy Calton of Honigman Miller Schwartz &
11 Cohn. And I'm here for Affinia Canada Corp., Itapsa S.A. de
12 C.V., a Mexican company, and Wix Filtration Products Europe
13 Limited. And I'm also here -- and it's a German name which I
14 don't pronounce right -- Valeo Schalder und Sorenson (sic)
15 GMBH, which --

16 THE COURT: That was pretty good actually.

17 MS. CALTON: I'd like to call mind of the Affinia
18 defendants --

19 THE COURT: Right.

20 MS. CALTON: -- and the Valeo, if I could.

21 THE COURT: Okay. That's fine. Thank you.

22 MR. HUTCHINSON: Your Honor, my name is Donald
23 Hutchinson and I'm with Miller Canfield in Detroit. And I
24 represent Kostal of America Inc. and also Kostal Mexicana S.A.
25 de C.V.

1 THE COURT: Okay. And I think we have someone on the
2 phone also?

3 MR. MCDOWELL (TELEPHONICALLY): Yes, Your Honor.
4 Ralph McDowell, Bodman LLP. I represent Freudenberg-NOK
5 General Partnership, Freudenberg-NOK Inc., Flexitech Inc. and
6 the Vibracoustic of Mexico S.A. de C.V.

7 THE COURT: Okay.

8 MR. ZEZULA: And, Your Honor, Nathan Zezula from
9 Robinson & Cole. I'm here on behalf of the Prudential
10 entities., Prudential Relocation, Prudential Relocation
11 Incorporated and Prudential Relocation International.

12 THE COURT: Okay. All right. So let me hear from
13 DPH. This is their motion for an extension of time to serve.

14 MR. FISHER: Your Honor, all of the objectants who
15 are appearing by telephone and in person and who filed
16 objections are -- represent foreign defendants. And so, I'd
17 like to address the foreign defendants separately and first
18 just review with Your Honor the extension that we seek with
19 regard to preference actions we brought against other
20 categories of defendants.

21 THE COURT: Okay.

22 MR. FISHER: The motion seeks an extension with
23 regard to twenty-one defendants as to which we requested that
24 summonses be issued. But as of the date that we filed this
25 emergency motion, summonses had not yet been issued by the

1 bankruptcy clerk. And that's why we requested the extension.

2 Since filing the motion on March 25th, in most
3 instances, those summonses have been issued. But I still
4 believe, Your Honor, that it would be prudent to grant the
5 extension as to those defendants. And we're requesting only a
6 thirty-day extension of the service deadline in order to ensure
7 that we can accomplish service before that deadline expires.

8 THE COURT: Okay. How many do you have left, do you
9 know?

10 MR. FISHER: Unissued summonses, Your Honor? I
11 believe of the twenty-one, there is only one remaining.

12 THE COURT: All right.

13 MR. FISHER: The second category are instances where
14 we have attempted to accomplish service, again on domestic
15 defendants, but for one reason or another, service was
16 returned, in many instances because those companies are
17 reportedly now defunct or may have relocated. So as to those
18 defendants, we're also requesting an extension of the service
19 deadline by thirty days in order to make a determination as to
20 whether it makes sense to proceed with those actions and to try
21 to complete service before the court-ordered deadline expires.

22 THE COURT: Did you -- are these claimants -- so you
23 got the address off of proof of claim or --

24 MR. FISHER: Yeah. In instances where we were
25 dealing with claimants, we checked the claim register to

1 identify addresses that way.

2 THE COURT: Okay. And the other ones, you got their
3 address by doing corporate searches?

4 MR. FISHER: Exactly, Your Honor.

5 THE COURT: Okay.

6 MR. FISHER: And to my knowledge, again, I suppose
7 there are questions about the extent to which our motion
8 reached these defendants, but we attempted to serve them at the
9 best addresses we could identify by FedEx and there are no
10 objections.

11 THE COURT: And -- these are only eleven, I think,
12 actions. The summons and complaint was returned as
13 undeliverable? Is that what happened --

14 MR. FISHER: Yes.

15 THE COURT: -- in each case?

16 MR. FISHER: Yes.

17 THE COURT: All right. And you've already checked to
18 see whether, in fact, you had the address wrong and, as far as
19 you could tell, the address was right?

20 MR. FISHER: That's correct. And so, we're doing
21 what we can to determine alternative addresses with regard to
22 these eleven.

23 THE COURT: Okay. All right. Does anyone have
24 anything to say on the relief with regard to these two
25 categories of adversary proceedings, that is, the originally

1 twenty-one and now one where the clerk had simply not gotten
2 around at the time that the motion was filed to issuing the
3 summons, and where the summons and complaint were returned as
4 undeliverable? All right. Well, without prejudice to the
5 objectors, but in light of the facts as set forth before me,
6 I'll grant the motion with regard to those two categories for
7 the thirty-day extension.

8 MR. FISHER: Your Honor, then addressing the category
9 of foreign defendants generally, we have -- foreign defendants,
10 of course, need to be served, in most cases, either pursuant to
11 the Hague Convention or pursuant to other treaties which has
12 required us to translate the summons and complaint, contact
13 foreign serving authorities in an effort to get these served.

14 As I'm sure Your Honor is aware, service through
15 international means can sometimes be a very lengthy process
16 that's out of the control of the plaintiffs. And for that
17 reason, technically speaking, Rule 4(m) does not apply or
18 impose a deadline on foreign service.

19 What we're seeking with regard to these foreign
20 defendants is an extension of the deadline so that service can
21 be completed in accordance with applicable international and
22 treaty requirements. And we're seeking an extension of 240
23 days in order to get that done.

24 THE COURT: Well, let me -- actually, you kind of
25 touched on an issue that, I guess, it's always been lurking in

1 the background with regard to foreign defendants which is
2 whether there is a deadline. Did the debtors take a view on
3 this issue at this point under Rule 4(m), whether there's a
4 deadline of 120 days that's applicable?

5 MR. FISHER: Your Honor, I don't believe -- there's
6 no rule imposed deadline. And I believe that there are cases
7 that have looked to Rule 4(m) by means of analogy but have
8 recognized that Rule 4(m) can't technically be applied to
9 foreign service because of the vicissitudes of accomplishing it
10 within that kind of time frame. And so, I think that the
11 approach that Courts have adopted is one of reasonableness and
12 one of looking at potential prejudice to the foreign
13 defendants.

14 THE COURT: Okay.

15 MR. FISHER: With regard to prejudice, Your Honor, I
16 understand that many of the foreign defendants are complaining
17 that these actions were filed in August 2007 and are only being
18 unsealed and efforts to serve them are only being made now.
19 But with regard to this motion to extend the service deadline
20 which, by court order, expires on April 5th, the only relevant
21 question of prejudice is the question of whether any of these
22 defendants would suffer any prejudice as a result of the
23 service deadline being extended from April 5th for another 240
24 days. In every instance, obviously, the objectants are now
25 aware of these complaints. And so, there's no basis to believe

1 that any objectant would suffer prejudice as a result of the
2 extension of the deadline from April 5th.

3 To the extent that they're complaining about
4 prejudice that they claim they may have suffered because these
5 actions were filed back in August 2007 and are being unsealed
6 and prosecuted only at this time, that's not a matter that can
7 appropriately be raised with regard to the service motion.
8 There are other defendants who have filed motions seeking to
9 vacate Your Honor's orders that preserved these actions for
10 prosecution post-consummation. These objectants can preserve
11 whatever rights they may have in that regard, but that's simply
12 not an issue that is appropriate for this motion which merely
13 seeks an extension of the service deadline to accomplish
14 foreign service.

15 THE COURT: What about -- I know of at least one of
16 the objections raised that -- the fact that DPH is seeking, I
17 think later this month, approval of omnibus procedures for
18 dealing with discovery and pretrial issues related to adversary
19 proceedings in general. And I take it the objection basically
20 says should we be focusing on -- or should we be forced to
21 focus on the procedures and/or be bound by them if we haven't
22 yet been served.

23 MR. FISHER: Your Honor, I think the answer to that
24 is simple. That motion is scheduled to be heard on April 22nd.
25 And the proposed order providing for the case management

1 procedures specifies that any party may apply for relief from
2 that order. And any foreign defendant served after that order
3 -- after a case management order is entered with regard to
4 these cases can seek relief certainly on the grounds that they
5 had not been served and thus were not a party to these cases --

6 THE COURT: Well, would they even have to seek relief
7 if they're not a party? I mean, it's odd to say that they'd be
8 bound if they're not party to an adversary proceeding that's
9 been --

10 MR. FISHER: Your Honor, the purpose --

11 THE COURT: -- served yet.

12 MR. FISHER: -- of the case management order, of
13 course, is to have uniform procedures in place that expedite
14 these cases --

15 MR. FISHER: So as a practical matter, it would seem
16 to me that they would want to participate in the hearing,
17 although with regard to deadlines and such, obviously those
18 deadlines would have to run from service, right? They wouldn't
19 be running from the filing of the complaint.

20 MR. FISHER: That's correct, Your Honor.

21 THE COURT: Okay.

22 MR. FISHER: And certainly, if any of the objectants'
23 counsel wishes to consent to service and be heard on April
24 22nd, that certainly would simplify matters greatly.

25 THE COURT: You would not preclude any of these

1 objecting defendants from arguing in opposition to the case
2 management procedures on the basis that they haven't been
3 served yet, right?

4 MR. FISHER: Certainly not, Your Honor.

5 THE COURT: And that wouldn't constitute an
6 appearance or acceptance of service or a waiver if they did
7 that.

8 MR. FISHER: Absolutely not, Your Honor.

9 THE COURT: Okay. All right. Okay.

10 MR. ZEZULA: Your Honor?

11 THE COURT: Whoever wants to speak first is fine.

12 MR. ZEZULA: Nathan Zezula for Prudential. We were
13 one of the defendants that was served on, I believe, March
14 24th, just a few days ago.

15 THE COURT: Okay.

16 MR. ZEZULA: I understand we don't fit into the
17 categories that the Court just laid out. I'd like to get some
18 objections on the record. If this is not the proper time to do
19 those, I can --

20 THE COURT: Well, I think the motion's moot as to
21 your client 'cause you were served within the date of the prior
22 order.

23 MR. ZEZULA: Correct, Your Honor. We'd be objecting
24 to the order that allows that the complaints be sealed and
25 served three years after the --

1 THE COURT: Oh, but that would be a motion to vacate.

2 MR. ZEZULA: Yes, Your Honor.

3 THE COURT: And you don't waive any rights in respect
4 of whatever rights you have to seek such relief by appearing
5 today.

6 MR. ZEZULA: Thank you, Your Honor.

7 THE COURT: Okay. You don't need to stay if you
8 don't want to. But you're here, so --

9 MR. ZEZULA: Right.

10 THE COURT: All right.

11 MS. CALTON: Judy Calton for the Affinia and Valeo
12 foreign defendants. And I'd like to note in the reply brief
13 which got e-mailed out last night, plaintiffs make some
14 representations about the Valeo entities. They're wrong.
15 They're unsworn. We put in the declaration of Thomas F. Miller
16 as to which names were names of real entities, et cetera. So I
17 would just -- I don't know basis of those representations but
18 we actually have sworn representations as to names that don't
19 represent real entities, et cetera, that were not agreed.

20 THE COURT: Okay.

21 MS. CALTON: Okay. The extension request today is
22 not 240 days but it's three years two months from the
23 expiration of the statute of limitations. Rule 4(f) applies.
24 Time to serve foreign defendants, under Rule 4(f), as you said,
25 uses 4(m), the 120 days, as a model. But because there's some

1 understanding of the complexity of foreign service, they're not
2 bound by that. And according to the Second Circuit in the
3 Montalbano v. Easco opinion, they use a due diligence standard
4 for timing of foreign service. And dismissal, which I think
5 would also be whether you should extend it, is proper, or not
6 extending it, where the plaintiffs "have not exactly bent
7 backwards to affect service".

8 Plaintiffs have not exactly bent over backwards to
9 affect service. After this last six month extension, which
10 they got in October 2009, knowing the issues with foreign
11 service, they can't claim that was a surprise to them, they
12 didn't start the process of foreign service until March.
13 Instead, they followed a deliberate strategy of requesting
14 summons first for the small dollar amounts. And the record
15 shows that in November they requested twenty-eight ranging from
16 261 to 700,000 something. And they kept moving up with dollar
17 amounts. In February, they were averaging about a million and
18 a half. Then in March, they moved into the big dollar amount.
19 For Affinia, which has seventeen million plus at issue, they
20 requested that on March 4. For Valeo, which has over nineteen
21 million at issue, they requested it on March 18th. That's not
22 due diligence. That's not bending over backward, particularly
23 where they have to be translated, go through where you start a
24 proceeding in the other country, et cetera. They had to know
25 that wasn't enough time. And they had to know that these were

1 the big dollar ones.

2 And apparently, from one of the replies, it wasn't
3 until March 24 that paperwork was sent to the international
4 process server to start the process. So you're talking they
5 waited until two weeks were left before this expiration of the
6 fourth extension to do anything. And they do cite Wise v. DOD
7 but that's a 4(m) case not a foreign one.

8 And they also cite a four factor test from Gore on
9 what the Court should look at in deciding whether to grant an
10 extension. And I was -- it came so late last night and I
11 didn't have the right kind of computer access so I couldn't
12 read the Gore opinion. But I'd be very surprised if that
13 involved a fifth request asking extensions over three years for
14 the expiration of the statute of limits.

15 But the four factors get denial with time-barred
16 refiling of case. That is certainly true -- that certainly
17 favors the plaintiff. But that one factor alone cannot be
18 sufficient to justify extension 'cause then they could always
19 get an extension no matter what.

20 The second factor is defendant have notice of a claim
21 before the expiration of the statute of limitation. Well,
22 there was no notice because the August motion to preserve
23 claims also included a request for abandonment. And the
24 debtors represented to the Court that they had decided to
25 abandon claims against foreign vendors and the Court granted

1 that motion. It's the exact same motion and order that
2 preserved and provided for the filing under seal. I don't know
3 how the foreign defendants could know, based on that motion and
4 order, that they were going to be sued anyway and under seal.
5 They didn't have notice. They have notice that the claims
6 against them were being abandoned. Now, they haven't come up
7 with a reason why that isn't an effective abandonment. And I'm
8 not arguing today to rule that they were abandoned. But
9 certainly, the foreign defendants have notice that they were
10 abandoned to the extent they were noticed. And I have to say,
11 well, Valeo defendants were given notice of that motion; the
12 Affinia defendants were not. They weren't served with it. So
13 there's just no basis to say that they have notice before the
14 expiration of the statute of limitations.

15 THE COURT: Where --

16 MS. CALTON: And -- okay. I'm sorry --

17 THE COURT: Can I interrupt you --

18 MS. CALTON: Yeah.

19 THE COURT: -- cause I'm afraid I'll forget some of
20 my questions as you go along. Where is the deadline in Rule
21 4(f)?

22 MS. CALTON: There is no deadline. There is no
23 expressed deadline. That's why the Courts have said that they
24 look to 4(m) as some kind of guidance. But that's not --

25 THE COURT: But why --

1 MS. CALTON: -- it.

2 THE COURT: If there's no deadline then --

3 MS. CALTON: Then they look to a due diligence
4 standard.

5 THE COURT: But to meet what? To meet what deadline?

6 MS. CALTON: They don't state.

7 THE COURT: How can you be due diligent --

8 MS. CALTON: Because they --

9 THE COURT: -- if there's no deadline?

10 MS. CALTON: In the due diligence cases, they are
11 going by analogy to the 120 days.

12 THE COURT: But there is no 120 days in 4(f).

13 MS. CALTON: Well, you know, I don't think it was
14 intended that there'd never be a deadline for a foreign
15 company. And I think you have to look at initiation rather
16 than accomplishment.

17 THE COURT: But how do we know what the deadline is?
18 And if you're saying -- I mean, I take it, you're trying to put
19 this into 4(f) because --

20 MS. CALTON: I realize that --

21 THE COURT: -- because you don't want the amendment
22 to 4(m) which gives the Court the discretion to extend the
23 period even if there's not good cause whatever that means.

24 MS. CALTON: Yes.

25 THE COURT: But --

1 MS. CALTON: You know, I would say ---

2 THE COURT: I mean, I guess I need to know what the
3 deadline is before I can determine what the due diligence
4 should be.

5 MS. CALTON: If it weren't established some other
6 way, it was established by the extension order which applied
7 both to foreign and non-foreign.

8 THE COURT: So the orders --

9 MS. CALTON: So you'll get a --

10 THE COURT: -- themselves establish the deadline?

11 MS. CALTON: Yes.

12 THE COURT: Doesn't that in itself then vitiate your
13 argument that I should be looking back to the date of the
14 initial order as opposed to the date when the debtors sought
15 this particular request?

16 MS. CALTON: No. I've seen no case that discusses
17 repeated deadlines like this.

18 THE COURT: Well, I understand that.

19 MS. CALTON: Yes.

20 THE COURT: But if you're talking about the basis for
21 due diligence being a deadline and whether you're using due
22 diligence to comply with the deadline, and if the deadline is a
23 deadline that's set only in the order, then it would seem to me
24 that the timing should start from the deadline that that order
25 sets not from deadlines set by earlier orders.

1 MS. CALTON: I believe that the rule implies some
2 kind of reasonableness standard because otherwise there'd never
3 be a deadline no matter what. And I think the Courts are
4 saying the same thing. I don't agree that you --

5 THE COURT: Well --

6 MS. CALTON: -- look back to the most recent ones but
7 let's say you did. It was 180 days and they didn't start until
8 almost the expiration of that --

9 THE COURT: Okay. No. I --

10 MS. CALTON: -- to try to do that.

11 THE COURT: -- understand that argument. I guess the
12 other question I had is, isn't this really just about if the
13 debtor says that issue and that issues about due process and
14 the effect of a delay, including the effect on evidence and the
15 like, that occurred up to the date of their most recent
16 request -- aren't those issues for a different type of
17 proceeding which is a motion to vacate the orders or a motion
18 for adoption of sort of presumptions in the adversary
19 proceeding with regard to --

20 MS. CALTON: It's my belief --

21 THE COURT: -- who has the burden as regard to
22 evidence?

23 MS. CALTON: No. It's my belief they have the burden
24 of obtaining the extension 'cause otherwise they wouldn't have
25 moved it and they have to establish it. And I think prejudice

1 that we've already suffered which would be compounded is a
2 factor. And I would also talk when you get up to the prejudice
3 issue, the Second Circuit in the Zapata case said if you're
4 after the statute of limitations, we'll presume prejudice. So
5 I don't think, one, it's presumed and, two, we have actual
6 prejudice and, three, we have the potential prejudice. I don't
7 know to what extent a case management order guiding the great
8 majority of these cases and carving out a very few would, in
9 essence, protect their rights. That's the fourth factor from
10 the Gore test that they cite.

11 The third factor is very interesting. It's that
12 defendant attempted to conceal defects in service which I have
13 to presume is to fool the plaintiff into thinking service had
14 been effective and then let the deadline pass. That's
15 obviously not the case here in the Gore test. That one favors
16 us. We have -- that we didn't have notice before the deadline,
17 that one favors us. And we have prejudice which is both
18 presumed and actual here.

19 So I think, out of the four Gore factors, three of
20 them favor not extending and only the fact that the claims
21 would be barred favor doing it. I don't see how that alone can
22 be enough. And in fact, they have another prejudice which I
23 think really came up in their reply brief that I got last
24 night. They want to claim that because the foreign defendants
25 shut down factories and didn't take extra steps to preserve

1 their records and preserve their witnesses, they should be
2 liable for spoliation sanctions.

3 THE COURT: No. They want to claim that if, in fact,
4 evidence was destroyed with knowledge of the complaint then
5 they --

6 MS. CALTON: Yeah. But they're claiming knowing that
7 Delphi -- the three preference actions even though you didn't
8 know against whom --

9 THE COURT: Well, that's not going to go very far.

10 MS. CALTON: Okay. But I mean, that's just an
11 example of the nightmare of prejudice here.

12 THE COURT: Well --

13 MS. CALTON: Delphi is --

14 THE COURT: It's not going to be a nightmare.

15 MS. CALTON: Okay. Well, Delphi's been given --

16 THE COURT: On the other hand, if someone knew of the
17 existence of a complaint against them then that'd be a
18 different story. I mean, it's that simple.

19 MS. CALTON: I don't know how they could have the way
20 it happened here. But --

21 THE COURT: Well, you know, people do run things.

22 MS. CALTON: Okay. Delphi has given ample cause to
23 deny an extension.

24 THE COURT: I mean, there was a motion, right? There
25 was a motion to do this, to file it under seal and the like.

1 It was served on people who had filed notices of appearance. I
2 believe it was served on at least one of your clients.

3 MS. CALTON: Yes. But not the Affinia one.

4 THE COURT: I understand.

5 MS. CALTON: Yeah.

6 THE COURT: But I'm just dealing with the spoliation
7 argument. If one of your clients -- if it turns out to be
8 evidence that one of your clients followed up with Delphi and
9 said I got this motion. Am I one of the defendants? If
10 Delphi -- the evidence will show Delphi said yes, you are then
11 they may be right about spoliation. On the other hand, if
12 there was no follow-up, if someone was in the dark then that's
13 a pretty easy issue.

14 MS. CALTON: Okay. Well, I think they've given ample
15 cause to deny the extension by sleeping on their obligation of
16 due diligence to initiate service. And any more extension
17 should be denied.

18 THE COURT: Okay. Of course, in Zapata, the service
19 was after the period expired and there was no attempt to
20 request service within the period.

21 MS. CALTON: Yes. But the standard or framework in
22 which you evaluate it did go where you -- yep. You presume
23 that there will be prejudice to the plaintiff because their
24 claim will be time barred. But you also have to presume
25 prejudice. And then you have to start weighing those. You

1 can't say that there's no prejudice to the defendant.

2 THE COURT: Okay.

3 MR. HUTCHINSON: Your Honor, I'll try to address just
4 some of the issues that seem to be of concern to the Court.

5 THE COURT: Okay.

6 MR. HUTCHINSON: And again, my name is Donald
7 Hutchinson and I represent Kostal of America Inc. and Kostal
8 Mexicana, S.A. de C.V. I'll call them Kostal America and
9 Kostal Mexico.

10 Your Honor, with respect to the issue of prejudice,
11 is the issue of prejudice just based on a measure of where we
12 are today as opposed to 240 days down the road or does the
13 issue of prejudice going back to the time these complaints were
14 filed -- what's the two tests for today's motion?

15 THE COURT: Right.

16 MR. HUTCHINSON: I think that the argument that we
17 have made in opposition to this motion is that the whole period
18 of prejudice is relevant because the whole procedure that
19 started in August of 2007 was an intentional scheme to deny
20 notice to these defendants. The purpose of filing these papers
21 under seal, the purpose of delaying the issuance of summons,
22 the purpose of extending the deadline to serve a summons and
23 complaint has been expressed in every one of the motions that
24 has been filed on this respect as to not interrupt the debtors'
25 negotiations with these people that might be potential

1 preference defendants, the debtors' ongoing business
2 relationships with these people. The whole purpose, again,
3 expressed is to deceive these defendants and to make them
4 believe that they are not being sued. And I can speak -- I
5 can't speak for Ms. Calton's clients but --

6 THE COURT: Wasn't the motion on notice?

7 MR. HUTCHINSON: It was not noticed to my client.
8 They knew nothing about this, any of this, until two days ago
9 for Kostal Mexico and three days ago for Kostal America.

10 You know, the debtors did rush out and they did --
11 with respect to our clients, they did, on March 18th, request
12 for the first time the issuance of the summons in our adversary
13 proceeding. The summons was issued on the 24th and on that
14 same day, they made an attempt of sort to serve the summons and
15 complaint on both Kostal America and Kostal Mexico. They
16 actual did effectuate service and process on Kostal America so
17 this motion is moot with respect to Kostal America.

18 THE COURT: Right.

19 MR. HUTCHINSON: With respect to Kostal Mexico, what
20 they attempted to do is they attempted to mail a copy to an
21 address in Alabama where they thought Kostal Mexico had a place
22 of business and officers who might be able to accept process.
23 And then they also sent a Federal Express package down to
24 Juarez where our client is located in Mexico.

25 So they had in mind, at least, the means --

1 THE COURT: So what was needed to serve them in
2 Mexico?

3 MR. HUTCHINSON: They had to go through the Inter-
4 American Conference which is like the Hague Convention. You
5 have to go through the Mexican court. You have to get the
6 Court to -- you have this Court communicate to the Mexican
7 court and the Mexican court will take the documents and
8 translate them into Spanish and the Mexican court --

9 THE COURT: Well, I thought that you could have it
10 translated by -- the Court doesn't translate them, right? I
11 thought you have them --

12 MR. HUTCHINSON: I am not one hundred percent sure
13 because I'm told that the Inter-American -- I forgot the name
14 of the document but it's not the Hague Convention that applies.

15 THE COURT: No. It's the Inter-American Conference.

16 MR. HUTCHINSON: And I'm not one hundred percent
17 familiar with that particular convention.

18 But short of the -- what I'm trying to say with
19 respect to what they did on March 24th is they did, at this
20 point, have an idea of how they might get some notice to Kostal
21 America and Kostal Mexico, but they didn't bother to do that in
22 August of 2007. And that's why --

23 THE COURT: I'm sorry. They didn't bother to do that
24 until --

25 MR. HUTCHINSON: In August of 2007 when they were --

1 THE COURT: All right. But I have to say -- excuse
2 me. There was a motion filed then. And it wasn't a motion to
3 deceive. All right? I would not have approved a motion to
4 deceive. It was a motion signed off on by the unsecured
5 creditors' committee saying that there's a recognition that
6 there's a two year statute of limitation and also recognizing
7 that, at the time, the plan was going to pay creditors a
8 hundred cents on the dollar and that it didn't really make
9 sense for creditors to have to hire people like you to defend
10 them in a situation where it was likely to be moot.

11 MR. HUTCHINSON: It could --

12 THE COURT: And it was on very wide notice. I accept
13 that it wasn't on notice to your client. But there were lots
14 and lots of potential recipients of references who got actual
15 notice of it. And there were no objections. Everyone was
16 delighted not to be sued. They understood.

17 MR. HUTCHINSON: Well, but it could have been
18 accomplished in -- the steps that were taken were not -- one,
19 the papers were filed under seal. Two, the Court was
20 instructed to issue a summons --

21 THE COURT: The adversaries were filed under the
22 seal --

23 MR. HUTCHINSON: Right.

24 THE COURT: -- not the motion for approval of it.

25 MR. HUTCHINSON: No. I understand that. But let me

1 say, there were three steps taken. One was to file the
2 documents under seal. The second was to defer the issuance of
3 the summons. And the third was to defer the time period for
4 the debtor to file -- or to serve the summons and complaint.
5 The latter two steps were the only two things that were
6 necessary to accomplish the laudatory purpose of not requiring
7 the debtors and defendants to engage in litigation that might
8 never be pursued. There was no reason --

9 THE COURT: What's the first thing --

10 MR. HUTCHINSON: -- to seal the documents.

11 THE COURT: What's the first thing a client does when
12 it gets a summons and a complaint?

13 MR. HUTCHINSON: Investigates the matter.

14 THE COURT: And hires a lawyer.

15 MR. HUTCHINSON: And hires a lawyer.

16 THE COURT: All right.

17 MR. HUTCHINSON: But if the clients had been notified
18 that complaints had been filed but they might not be pursued,
19 that the Court has authorized and directed that summons shall
20 not be issued and that the debtors are not going to be required
21 to file and serve a summons because the debtors might never be
22 pursuing these actions, that is something that gives notice to
23 the potential defendants that there might be a lawsuit down the
24 road and if they need to take steps to preserve their knowledge
25 and record, they should do so. Or if they want to take steps

1 to resolve the matter, they can do that. But at the same time,
2 not waste their time if they want to take the chance that the
3 lawsuits will go forward. This filing under seal -- the only
4 purpose that you can attach to that is to keep the matter away
5 from the potential defendants, keep them from knowing that
6 they're targets of a lawsuit.

7 THE COURT: I guess I come back to my basic question,
8 though, which is aren't all those arguments properly made in
9 two other contexts, either a motion to vacate those orders or,
10 alternatively, for the Court, when it gets to issues of
11 evidence, to -- and, of course, 547 has both its own
12 requirements which the debtor has to prove and affirmative
13 defenses. So I'm assuming this would come in more likely in
14 affirmative defenses to shift the burden onto the debtor
15 because there's the evidentiary issue. It seems to me that,
16 given the existence of the orders and the extensive history of
17 those orders which we're just barely the scratching the surface
18 of now, that those sorts of arguments really are out of place
19 here where the deadline is already established by that order
20 and that the focus really should be on the next 240 days or
21 whatever date they're requesting.

22 MR. HUTCHINSON: I agree that the two situations that
23 you described are certainly appropriate times and places to
24 discuss the issue that we're talking about. But I think that
25 this is also an appropriate time. And if I have an argument

1 why that whole history is relevant to today's motion, my
2 argument is that this step, the step that they seek to take
3 today, is a step to continue the chain of, really -- if it
4 wasn't intentional, it was de facto deception.

5 THE COURT: But on the prejudice point, if we're
6 just -- I mean, I think you have to make that argument because
7 as of the date that your client got this motion, they knew
8 there was a complaint.

9 MR. HUTCHINSON: Yes.

10 THE COURT: So there's no -- I don't know where the
11 prejudice would be from here to the date that they serve it.
12 Was there any prejudice then?

13 MR. HUTCHINSON: Well, no, probably not.

14 THE COURT: So -- okay.

15 MR. HUTCHINSON: So that's my argument. If you don't
16 accept it, you don't accept it and I'll move on.

17 THE COURT: Okay. No. I appreciate that.

18 MR. HUTCHINSON: With respect, though -- with respect
19 to the other argument, the -- as I said, with respect to Kostal
20 America -- and part of the reason I'm here, Your Honor, is
21 because I didn't want to be, by my absence, waiving any --

22 THE COURT: No. You're not as I made clear to
23 Prudential's counsel. That's not it.

24 MR. HUTCHINSON: Or both by my presence, I don't mean
25 to waive any of those arguments --

1 THE COURT: You're not. I hope I made that clear
2 with Prudential. It's the same with you.

3 MR. HUTCHINSON: But I also am concerned about this
4 present motion. And this deception and prejudice argument is
5 but one point. The other is that whether or not Rule 4(m) is
6 applicable to service in a foreign country and whether there's
7 any deadline with respect to service in a foreign country.
8 Well, the previous motions that have granted that extension
9 represented to the Court that the reason for it is because
10 service in a foreign country takes time. So those prior orders
11 that did set deadlines, I think, it's really quite ambiguous as
12 to whether or not they apply to service in a foreign country.
13 I mean, the debtor was requesting an extension of the deadline
14 to serve foreign defendants but if there was no deadline then
15 why were they requesting it and why was it necessary to enter
16 orders.

17 THE COURT: Well, I mean, it didn't matter, right?
18 It's kind of ice in winter.

19 MR. HUTCHINSON: Pardon me?

20 THE COURT: It didn't matter. If they didn't need
21 it --

22 MR. HUTCHINSON: Then it was just an exercise --

23 THE COURT: Then it was just ice in winter. It was a
24 comfort order to them.

25 MR. HUTCHINSON: An exercise in futility or

1 something, I don't know.

2 THE COURT: Well, it's an exercise -- I mean, I
3 guess -- the same thought crossed my mind. If there's no
4 deadline, why did the debtors ask for this with regard to
5 foreign --

6 MR. HUTCHINSON: Yeah.

7 THE COURT: -- foreign defendants at all. There is,
8 obviously, an issue as to whether it applies or not. Some
9 courts say it does; some courts say it doesn't. If it doesn't,
10 I don't see how anyone's hurt, right? I mean --

11 MR. HUTCHINSON: Right.

12 THE COURT: -- if it doesn't apply, if there's no
13 deadline then no one's hurt.

14 MR. HUTCHINSON: Well, what I think all of the cases
15 do say -- I think what all of the cases do say, if there is no
16 deadline then I think what happens then is when the plaintiff
17 does effect service in a foreign country pursuant to the
18 appropriate treaty then that defendant is free to come in and
19 say, well, although there isn't an explicit deadline, it was
20 too late and I'm prejudiced. And so then --

21 THE COURT: But again, it comes back --

22 MR. HUTCHINSON: -- our evidence --

23 THE COURT: It comes back to prejudice in conducting
24 the lawsuit, right?

25 MR. HUTCHINSON: Pardon me?

1 THE COURT: Then it comes back to prejudice in
2 conducting the lawsuit.

3 MR. HUTCHINSON: Right. And then you go back to the
4 whole thing because it's a -- the courts' other orders weren't
5 really -- you know, all the orders, the order they're
6 requesting today and the previous order, said the deadline
7 under 4(m) is extended.

8 THE COURT: But if there's no deadline, it doesn't
9 mean anything.

10 MR. HUTCHINSON: Right. So then the defendant, when
11 we get served in 240 days --

12 THE COURT: Right.

13 MR. HUTCHINSON: -- will come in and we'll say, well,
14 you know what, this is -- this service is untimely. And --
15 based on equitable arguments that have been justified in the
16 other courts. And we'll say they have the complaints on file
17 in 2007 and it's 2010 now.

18 THE COURT: But isn't the standard on such a
19 motion -- I mean, everyone agrees that 4(f) and not 4(m)
20 applies to individuals, right? So in an individual context
21 like that, isn't the standard actually more flexible? Isn't
22 the Court supposed to weigh -- I mean, isn't there a general --

23 MR. HUTCHINSON: Oh, yeah. I'm saying that there
24 would be a flexible standard.

25 THE COURT: I mean, it's more flexible than 4(m).

1 MR. HUTCHINSON: Yeah. I'm saying that there would
2 be a flexible standard.

3 THE COURT: All right. Well --

4 MR. HUTCHINSON: If that's the way it is --

5 THE COURT: -- it would seem to me that -- well, that
6 raises an interesting issue. And you were talking about not
7 wanting to waive rights.

8 MR. HUTCHINSON: Yeah. I don't want to waive rights.

9 THE COURT: So let me -- I should pose the same
10 question to DPH on this. If, in fact, it turns out that 4(f)
11 applies and not 4(m), so therefore there's really no deadline
12 except sort of a sense of what's fair, is this motion really
13 moot and you'll deal with it on a case by case basis when you
14 get people's answer?

15 MR. HUTCHINSON: Your Honor, even if the rules don't
16 provide a deadline, we've conducted ourselves as though --

17 THE COURT: You said there's an order -- there's a
18 deadline in the order?

19 MR. HUTCHINSON: -- the third extension order sets a
20 deadline. And so, perhaps there is an element of this motion
21 that is an abundance of caution. But certainly in light of
22 that deadline, we didn't want to let the deadline lapse without
23 making some motion to call to the Court's attention the issue
24 of foreign service.

25 THE COURT: So the only issue that would be preserved

1 here, if I rule in the debtors' favor, in your view, would be
2 not issues based on inadequacy of service but rather issues
3 with respect to any attempt to vacate the prior orders and have
4 the limitations period apply or issues with regard to perhaps
5 shifting the burden of proof if people make a case that because
6 of the delay, they shouldn't be put to the affirmative task of
7 showing, for example, ordinary course or new value if the
8 amount of the delay they're -- when this disappeared.

9 MR. HUTCHINSON: Your Honor, yes. Our position is
10 that to the extent that any defendant argues that they've been
11 prejudiced as a result of the delay that preceded this motion,
12 they preserve those arguments and those arguments may
13 appropriately be presented at any of the various forums that
14 Your Honor suggested.

15 THE COURT: i.e., in my -- now I'm assuming, for sake
16 of argument, 4(m) applies. And in my weighing of the factors,
17 one of the factors being prejudice, that weighing exercise is
18 not necessarily collateral estoppel for purposes of an argument
19 about the -- either a discovery dispute or the weighing of
20 evidence or a party's burden.

21 MR. HUTCHINSON: Correct, Your Honor. And if the
22 parties focus on the prejudice -- and I don't believe there's
23 been any showing of prejudice that follows this motion --

24 THE COURT: Well, that's true.

25 MR. HUTCHINSON: -- then it makes clear that anything

1 that preceded this motion is an argument that's preserved.

2 THE COURT: That's probably the better way to look at
3 it. The debtors' view is that the only prejudice that I should
4 be weighing here is the prejudice over the next 240 days not
5 the prior period.

6 MR. HUTCHINSON: Exactly, Your Honor.

7 THE COURT: Okay. All right.

8 MR. HUTCHINSON: I did have one --

9 THE COURT: In which case, clearly, there'd be no
10 collateral estoppel issue because that's not even at issue here
11 then. All right.

12 MR. HUTCHINSON: Your Honor, I did have some more to
13 say and I'll try to be quick with it.

14 THE COURT: Okay. Go ahead. That's fine.

15 MR. HUTCHINSON: With respect to the request, if the
16 debtors are then continuing to request an extension of a
17 deadline or get a comfort order with respect to foreign
18 defendants --

19 THE COURT: Right.

20 MR. HUTCHINSON: -- then there's still -- it seems to
21 me there's still some showing that needs to be made that they
22 deserve such an extension. And I think that the history here
23 does not support a showing that they deserve an extension. And
24 as Ms. Calton described during her presentation, I don't
25 understand why the debtors waited until two weeks until the

1 expiration of the current deadline even to request the issuance
2 of a summons. That doesn't --

3 THE COURT: Okay.

4 MR. HUTCHINSON: That doesn't -- you know, there's
5 got to be some explanation for that that's not been said or --
6 in any of the papers or today. And if there is a reason, I'd
7 like to know what that is. But they could have easily have
8 requested all of those immediately after the Court entered the
9 last order or, I think, back in April of 2008 when the funding
10 for the reorganization plan fell through in the first place. I
11 just don't see any explanation for that. And it seems to me
12 not -- what's happened here is it has the appearance of
13 nonchalance and that the Court will grant any extension that
14 the debtors want. And maybe there's something that I'm not
15 seeing. But --

16 THE COURT: Okay.

17 MR. HUTCHINSON: And then the last thing is, as Ms.
18 Calton said, the papers that were filed initially in August of
19 2007 requested authority without further procedures to abandon
20 claims for preferences for -- against -- for payments to
21 foreign suppliers of the debtors. That was explicit in that
22 motion and the Court ordered granting that motion, explicitly
23 granted that authority. And I don't understand why those
24 claims are still alive in light of that. And some showing has
25 to be made, I think, for the purpose of this motion why those

1 claims are alive. And I don't think anything's been said about
2 that.

3 THE COURT: Okay. All right. So why don't we turn
4 to the first question. Why did the debtors wait until mid-
5 March to start some of these foreign service of process efforts
6 when, clearly, it takes longer than a month to do it?

7 MR. FISHER: Your Honor, to that point, I would point
8 out, first, even if we had asked for these summonses a month
9 ago or two months ago, we would still be before Your Honor
10 asking for an extension of the deadline because of how long it
11 takes --

12 THE COURT: Right.

13 MR. FISHER: -- to complete foreign service.
14 Following consummation of the plan --

15 THE COURT: But you could say that if you started the
16 process on April 4th, too. I mean, there's some point where it
17 just doesn't look right.

18 MR. FISHER: Well, the final order entered by Your
19 Honor was in October 2009.

20 THE COURT: Right.

21 MR. FISHER: And it contemplated that following the
22 effective date, these summonses and complaints would be
23 unsealed and the service process would begin.

24 THE COURT: Right.

25 MR. FISHER: Beginning in October 2009 and for the

1 months following, the reorganized debtors' resources were
2 extremely taxed with pursuing the transactions that had to be
3 completed in order to realize their emergence from
4 reorganization. The debtors engaged new counsel to prosecute
5 these preference cases and we proceeded to have these cases
6 unsealed and served in an expeditious manner under the
7 circumstances. Given the age of the cases, in a number of
8 instances, we've had to do a certain amount of research to
9 understand what's happened to these entities during the period
10 since August 2007.

11 And in terms of -- and --

12 THE COURT: But is that -- but these are the big
13 ones, right? I mean, that's --

14 MR. FISHER: So to that point, Your Honor, we had to
15 make a choice. We couldn't launch all 177 actions at once. It
16 would have been taxing to the clerk's office. It would have
17 been taxing to the resources of the debtors. And so, we
18 divided them up into tranches. I suppose that we could have
19 made a choice alphabetically. We could have made a choice
20 otherwise. We did, in fact, roll out the cases in ascending
21 order of the value of the claims at issue. I think that if we
22 had focused on the fact that some of these higher dollar value
23 defendants were foreign defendants, perhaps we could have
24 moved -- we could have sought to have them unsealed earlier but
25 we simply didn't.

1 In terms of the standard, I think that there's been
2 some confusion about what it is that we need to show to get an
3 extension of the deadline assuming there is a deadline, of
4 course. And certainly, we can make a showing of good cause and
5 then in the absence of prejudice, the Court is required to
6 grant the extension. Here, the good cause is simply the length
7 of time that it takes to complete foreign service. But even
8 without a showing of good cause, Your Honor, in the absence of
9 prejudice, the Court has discretion, by analogy to Rule 4(m),
10 to extend the deadline.

11 THE COURT: Okay.

12 MR. MCDOWELL (TELEPHONICALLY): Your Honor?

13 THE COURT: I'm sorry --

14 MR. MCDOWELL: Your Honor?

15 MR. FISHER: Oh.

16 THE COURT: Oh. Who's this?

17 MR. FISHER: Is someone on the phone?

18 THE COURT: Yeah. Is someone on the phone?

19 MR. MCDOWELL: Yeah. Excuse me, Your Honor. Ralph
20 McDowell for Freudenberg --

21 THE COURT: Oh, yes, of course.

22 MR. MCDOWELL: It's harder when I'm not there to see
23 exactly what's going on. Could I just speak briefly?

24 THE COURT: Well, I had another question for the
25 debtor. The second question that counsel raised, which was a

1 good one, is at least in some of the cases, one of the factors
2 that Courts consider is whether the lawsuit is frivolous. And
3 the objectors here have said we're -- these causes of action
4 have already been abandoned. So what is the response to that?

5 MR. FISHER: As Your Honor indicated, we are, in this
6 hearing, skating along the surface of the issues that
7 surrounded entry of the three preservation orders.

8 THE COURT: Right.

9 MR. FISHER: As to a certain class of foreign
10 suppliers, the debtors sought authorization to abandon certain
11 potential claims against them. The debtors never, in fact,
12 abandoned those claims. And to the extent that this is some
13 sort of collateral estoppel type argument --

14 THE COURT: But wasn't authorization granted?

15 MR. FISHER: Authorization to abandon certain claims
16 against certain foreign suppliers was granted, Your Honor.

17 THE COURT: Okay.

18 MR. FISHER: Specifically, with regard to the issue
19 of the abandonment, I'd like to defer to my colleague, Mr.
20 Geoghan, from the Togut law firm.

21 THE COURT: Okay.

22 MR. GEOGHAN: Good morning, Your Honor. Dan Geoghan
23 from Togut, Segal & Segal. Your Honor, while it's true the
24 motion was filed seeking authorization to abandon certain
25 transfers to foreign suppliers, the order entered did not

1 direct the debtors to do so, number one. Number two, that
2 ordered entered on August of 2007 -- these complaints were
3 filed in late September of 2007. Clearly, these claims were
4 not abandoned. They were preserved and kept. The category of
5 foreign suppliers that were not pursued did not include the
6 defendants. They were not abandoned.

7 THE COURT: All right. So it's -- it'll be your
8 position that the relief sought that was granted in the August
9 letter didn't pertain to these lawsuits?

10 MR. GEOGHAN: Your Honor, I wouldn't say that the
11 relief sought in the August order doesn't pertain at all to
12 these lawsuits. But I would say, as to the debtors' decisions
13 as to which foreign suppliers to abandon did not include these
14 defendants.

15 THE COURT: Okay. All right.

16 MR. HUTCHINSON: Well, Your Honor, the motion said to
17 the contrary. The motion said the debtor had made the
18 determination that it is not worthwhile to pursue lawsuits
19 against foreign -- for payments to foreign suppliers. That's
20 what it says.

21 MS. CALTON: It's paragraph 26 of the motion.

22 MR. HUTCHINSON: Oh, I'll read it. "In addition, the
23 debtors seek authority to abandon the following categories of
24 potential preference actions which the debtors, in their
25 business judgment, have decided should not be pursued." And

1 the subcategory is Roman numerals. And number (ix) is
2 "Payments to Foreign Suppliers". Again, "the debtors in their
3 business judgment, have decided should not be pursued".

4 Payments to foreign suppliers.

5 MR. GEOGHAN: Your Honor, if I may, to reiterate one
6 point and make a second, first, to reiterate, I appreciate
7 that's what -- the motion sought that authorization. These
8 claims were clearly not abandoned. They were maintained --

9 THE COURT: You're taking the view that there was a
10 category of claims in which you were authorized to abandon but
11 then you had to take some affirmative action to actually
12 abandon them?

13 MR. GEOGHAN: Well, we didn't file a complaint
14 against them, Your Honor. We abandoned them. They were left
15 behind the statute of limitations.

16 THE COURT: Okay. Well, I don't -- does anyone have
17 the actual order?

18 MS. CALTON: Yes, Your Honor.

19 THE COURT: Is it attached to -- it's attached as an
20 exhibit?

21 MS. CALTON: I have an extra copy that I could pass
22 up, if it's okay.

23 THE COURT: Well, I thought it was attached as an
24 exhibit to your motion. But --

25 MS. CALTON: No. It got attached to the --

1 THE COURT: But I'm kind of fumbling around here so I
2 don't -- I can't find it.

3 MS. CALTON: I quoted it.

4 THE COURT: If you could give me the copy, that would
5 be great. Thank you.

6 (Pause)

7 THE COURT: All right. But this doesn't fall under
8 that additional category where you have the notice mechanism,
9 right?

10 MS. CALTON: I have the motion if you'd like to see
11 how they had before --

12 THE COURT: No. I was just -- you're not saying that
13 this --

14 MR. GEOGHAN: Your Honor, I'm sorry. What was the
15 question?

16 THE COURT: Are you saying that these causes of
17 action fall into the additional categories where this mechanism
18 to provide notice to the creditors' committee and the equity
19 committee -- and if they say it's okay then they can be
20 abandoned?

21 MR. GEOGHAN: No, Your Honor. I don't believe that
22 is what I'm saying.

23 THE COURT: Okay.

24 MR. GEOGHAN: I am saying that the category that was
25 described at -- excuse me -- that the intent of the motion was

1 to seek authorization to abandon these -- to abandon transfers
2 and certain parties. But it didn't direct -- it didn't seek
3 the Court to direct that we abandon them.

4 THE COURT: But the Court doesn't direct abandonment.
5 You get authority to abandon because you're abandoning.

6 MR. GEOGHAN: Yes, Your Honor. But clearly, in this
7 case, these were not abandoned. In addition, Your Honor --

8 THE COURT: But how could it be not abandoned when
9 you've got authority to abandon them? I mean, what more do you
10 need?

11 MR. GEOGHAN: Your Honor, we would have needed to not
12 file the complaint against the foreign suppliers. In addition,
13 Your Honor, the -- I don't believe these parties were part of
14 the group of foreign suppliers that the debtors were intending
15 to abandon.

16 THE COURT: But the motion didn't say that, right?

17 MR. GEOGHAN: Well, the motion might not have --

18 THE COURT: Did it specify out types of categories
19 that weren't going to be abandoned by type of supplier?

20 MR. GEOGHAN: Excuse me?

21 THE COURT: Did the motion -- I don't think the
22 motion carved out types of foreign suppliers against whose
23 claims weren't going to be abandoned, did it?

24 MR. GEOGHAN: No, Your Honor. I don't believe it
25 did. But it -- again, two points. It did not seek an order

1 abandoning them -- authority to abandon them in its discretion.

2 MR. HUTCHINSON: It doesn't say that either.

3 MR. GEOGHAN: And, Your Honor, the group of
4 suppliers --

5 MS. CALTON: It already exercised it.

6 MR. GEOGHAN: -- it was directed at was not simply a
7 matter of all foreign suppliers. It was directed at suppliers
8 that received payments pursuant to certain first day orders,
9 that being the foreign creditors.

10 THE COURT: No. That I understand. I understand
11 that point. I'm having trouble following the other point. I
12 mean, the motion doesn't say we're seeking authority but we may
13 not use it, right? It doesn't say that. It says we're seeking
14 authority to abandon.

15 MR. GEOGHAN: Correct, Your Honor. I don't believe
16 it says that -- they were seeking the authority. But again,
17 Your Honor, they also -- the order also does not say -- the
18 order does not say the debtors are abandoned. And clearly --
19 again, Your Honor, clearly -- and there were not many, as Your
20 Honor can see, from the number of foreign defendants that have
21 shown up, there were not many that were abandoned. Excuse me.
22 There were not many that were preserved.

23 THE COURT: Okay.

24 (Pause)

25 MR. GEOGHAN: Yeah. And let me add, in response to

1 what Ms. Calton just mentioned, there were approximately forty-
2 two. There were 11,000 potential defendants.

3 THE COURT: All right.

4 MS. CALTON: Your Honor, could I just make one big
5 point? He said that they were authorized to exercise their
6 discretion after the order. However, in paragraph 26, they
7 said they've already exercised their discretion and decided not
8 to pursue them. So I don't think that's correct.

9 MR. GEOGHAN: Your Honor, may -- I have one other
10 point. I don't believe, and particularly with regard to the
11 Kostal defendants, that there's any reliance on this. Even
12 if -- I'm not sure what the argument would be in that regard.
13 They alleged they were not served with the order so they had no
14 reliance on it.

15 THE COURT: No. It's a different point. It's not a
16 reliance point. It's -- again, there's no reason to extend a
17 deadline to serve if the underlying lawsuit is frivolous. I'm
18 not sure it is frivolous. But that's the context that this is
19 being raised in.

20 MR. GEOGHAN: And again, Your Honor, I don't believe
21 they are frivolous. The debtors preserved these assets. In
22 some cases, they are substantial.

23 THE COURT: Okay.

24 MR. GEOGHAN: Thank you.

25 THE COURT: All right. Mr. McDowell, you were going

1 to say something?

2 MR. MCDOWELL: Yes. Thank you, Your Honor. Just
3 briefly, I concur with counsel for the other defendants. My
4 case is a little bit different. My defendants are an adversary
5 proceeding, 07-02783. And as noted in our objection, the
6 claims against my clients were released over five years ago.
7 So this falls clearly into the category that you're discussing
8 now in terms of frivolous complaints. We should not have to
9 receive the complaint, deal with it, answer it, file a motion
10 to dismiss or anything else. We attached to the agreement that
11 we negotiated with Mr. Geoghan's firm that has a very clear
12 brief in it. And so, no extension should apply. In fact, our
13 case should be dismissed.

14 THE COURT: What's the debtors' response to that?

15 MR. FISHER: Your Honor, I haven't seen the objection
16 about which counsel on the phone is speaking. I can certainly
17 tell the Court that we have no interest in pursuing frivolous
18 actions and that if, in fact, as to this defendant there is a
19 release, we are happy to confer with counsel, look at what
20 counsel's argument is and if, in fact, the release applies to
21 this action, discontinue the action. But I simply don't know
22 enough about the facts to which counsel on the phone is
23 referring.

24 MR. MCDOWELL: Your Honor, we, like the other
25 defendants, we did not know about the motion because it wasn't

1 served although we have been toiling in this case for four and
2 a half years, five years with these debtors.

3 THE COURT: I'm sorry. Which motion are you
4 referring to as not being served?

5 MR. MCDOWELL: The present motion to extend the time
6 in our adversary proceeding.

7 THE COURT: Okay.

8 MR. MCDOWELL: And so, as soon as we found out about
9 it on Friday, we placed a call to Mr. Fisher's office. None of
10 them -- he was out of town so we upped the call to colleagues.
11 But those weren't returned. And it is unfair for all of the
12 numerous responses -- actions that we've had to take in this
13 case over the years, we have had to respond to all of --

14 THE COURT: Okay. Well, I'm not holding you to
15 having to have replied or objected to the motion other than
16 your objecting orally in court. I haven't seen the objection
17 either. What is the release that you're relying on?

18 MR. MCDOWELL: Your Honor, there was an agreement
19 which calls for the assumption of our contract which, of
20 course, is clear evidence that there's no preference.

21 THE COURT: Oh. Well, all right. Yeah, you're
22 right. If your contract was assumed then you're not going to
23 have a preference in respect of payments in the contract that
24 was assumed.

25 MR. MCDOWELL: But there's also just a flat out

1 release --

2 THE COURT: And you can't see but the debtors are
3 nodding their -- the debtors' boys are nodding their heads at
4 that.

5 MR. MCDOWELL: Yes. But again, Your Honor, we've
6 been run through the ringer on the case. And to have to
7 respond to the complaint, where is the due diligence on their
8 part to say, wait a minute, we released these guys? Why are we
9 pursuing a lawsuit against them. And the thirteen million
10 dollars, it can't be ignored. It needs to be dealt with. But
11 why should we have to respond? And again, it seems --

12 THE COURT: Was your client -- were these payments in
13 respect of that contract?

14 MR. MCDOWELL: Your Honor --

15 THE COURT: Would your client have other contractual
16 relationships with the debtor?

17 MR. MCDOWELL: My client would not, Your Honor. The
18 complaint is not detailed. It has very, very little
19 information about the transfers.

20 THE COURT: All right. Well, I think with regard to
21 your issue, it seems to me that if, in fact, the payments are
22 in respect of a contract that was assumed -- the payments that
23 are now being challenged are in respect of a contract that was
24 assumed during the bankruptcy case, then I would deny the
25 debtors' motion with regard to your adversary proceeding.

1 If the payments were in respect of other obligations,
2 other antecedent debt, then -- obligations arising under a
3 contract that was assumed during the bankruptcy case, under
4 365, then my inclination is to extend the service date with
5 regard to your client but only thirty days so that the debtor
6 can review the release that you'd be relying on separate and
7 apart from assumption. And I would have a hearing before that
8 thirty-day period would expire. And my belief is that if the
9 release is clear, the whole thing will become moot because the
10 debtor won't be pursuing the adversary proceeding.

11 MR. MCDOWELL: So the hearing that you speak of, Your
12 Honor, would be like a status conference or --

13 THE COURT: Well, it would have to be a hearing
14 because there'd be a deadline. But it just seems to me that
15 this is -- what you're referring to is a different level of
16 issue than the abandonment order issue. It's clearer to me --
17 well, it's crystal clear that if the payment is in respect of
18 an assumed contract then there's no issue. It also seems to me
19 that when the debtors' lawyers have the opportunity to review
20 the release, they'll know one way or the other whether it
21 applies and will either drop the lawsuit 'cause it's been
22 released or present to you and to me a reason why they
23 shouldn't.

24 But you're saying you actually have a written release
25 that's part of the assumption?

1 MR. MCDOWELL: Yes, Your Honor. It clearly says that
2 there is a release with respect to assumed contracts and any
3 other 547.

4 THE COURT: Okay.

5 MR. MCDOWELL: Again, it --

6 THE COURT: All right. Well, then -- and that was
7 approved by order of the Court?

8 MR. MCDOWELL: It was -- Your Honor, it was approved
9 as part of the -- there was a procedure under the orders of the
10 Court regarding assumption and --

11 THE COURT: Right.

12 MR. MCDOWELL: -- critical vendors.

13 THE COURT: Okay. All right. So that's my
14 inclination with regard to your objection -- which, again, I
15 haven't seen either. And I'm not faulting you for it. This
16 was brought on on short notice.

17 MR. MCDOWELL: Yeah. We filed it in the adversary
18 proceeding, Your Honor, which is where the motion that we
19 didn't receive was filed.

20 THE COURT: Okay. Fine. Okay. All right. Well, is
21 there anything else?

22 MR. HUTCHINSON: Just one thing, Your Honor. Again,
23 when they talked about the diligence that they've been
24 exercising to pursue -- to get these cases going and get the
25 deposits going, they say that 177 cases is just too much to hit

1 the courts with. But, you know, in this court alone, I'm
2 familiar with, I believe, in the Ames case, there were 1500
3 preference lawsuits. I think in the Tower Automotive case,
4 there were 1600.

5 THE COURT: Oh, I agree with that. On the other
6 hand, it's unrebutted that perhaps because of all the other
7 lawsuits that are happening and all the other activity that is
8 happening, as of the date the motion was made, the clerk's
9 office wasn't able to process twenty-one of them. So, you
10 know, you all don't see this but -- because normally, these
11 matters are on omnibus days. But the sheer number of lift stay
12 motions over the last six months has gone up, I'd say, ten-
13 fold. Where I used to have two or three a week, I now have
14 fifty a week. So I think that -- that doesn't take the onus
15 off the debtor. But it does take some onus off the clerk's
16 office, I think.

17 Okay. I have a motion before me by DPH Holdings
18 Corporation, which is the successor under Delphi Inc. and its
19 related debtors' confirmed and effective Chapter 11 plan, to
20 the debtors' rights in respect of avoidance proceedings for
21 further extension of its date to serve or cause the service of
22 summons and complaint in adversary proceedings that were
23 commenced, in fact, years ago.

24 The motion originally sought approval of the
25 extension of time to serve sixty-two defendants. Those

1 defendants fell into three categories. There has been no
2 objection to the motion with respect to two of those categories
3 and I'll address those first. They are, first, actions in
4 which the clerk of the court has not yet issued a summons and,
5 second, actions in which service was attempted at the best
6 addresses available to DPH but not completed, it appears in
7 each case, because of either the change in location of the
8 defendant without reasonable basis for the debtor to know about
9 change in location or, more likely, the dissolution of the
10 defendant.

11 In the first category, the clerk has been able to
12 issue summonses on all but one action. My belief is it's
13 probably likely that the clerk will be able to issue the
14 summons in respect of that action also before the April 5th
15 deadline. But in that case, as well as in the latter category,
16 I believe that an extension of time under Federal Rule 4(m),
17 which applies to these adversary proceedings under Bankruptcy
18 Rule 7004, is appropriate. These are each domestic
19 corporations or entities -- these defendants are. And so,
20 therefore, Rule 4(m) clearly applies to them.

21 It appears to me in both cases that the plaintiff,
22 DPH Holdings, has sought to serve the defendants in the two
23 categories in good faith in reliance on the Court's prior
24 orders and -- which extended the deadline to serve them and
25 that the order to serve them during the current period is not

1 due to a failing of the claimant. And therefore, under the
2 words of Rule 4(m), "the Court shall authorize the extension"
3 which, as requested, is for thirty days.

4 The third category of -- and I'm sorry. Before I
5 continue, Mr. McDowell, I take it from the name of your client
6 that your client is a foreign entity, is that correct?

7 MR. MCDOWELL: Your Honor, no.

8 THE COURT: No?

9 MR. MCDOWELL: Certain of my clients are domestic
10 entities.

11 THE COURT: Oh, all right. Well, they had a --

12 MR. MCDOWELL: And --

13 THE COURT: Then they're probably covered by this.

14 MR. MCDOWELL: Well, it's not clear, Your Honor.
15 They mixed everything together. They have all the names wrong.
16 They have entities that don't exist. And so, they -- their
17 motion, which they captioned in the main case but then filed in
18 the adversary proceeding so that no one received it -- they
19 have my client listed on Exhibit C just under the name
20 Freudenberg, et al., and the adversary proceeding.

21 THE COURT: Okay. But Exhibit C is the foreign ones,
22 right?

23 MR. MCDOWELL: Correct.

24 THE COURT: All right. So I don't believe that your
25 clients would be covered by my ruling on the -- that I just

1 gave on the other two categories. I don't think your client is
2 the one that's not been served yet. And I would doubt that
3 your client's the one whose service has been returned, address
4 unknown, or unable to deliver.

5 So let me turn to your client now. The third
6 category of defendants where the debtors' successor, DPH
7 Holdings, has sought an extension of time to serve is
8 Freudenberg-NOK General Partnership? Is that the correct name?

9 MR. MCDOWELL: That is a correct name of one of my
10 clients, yes.

11 THE COURT: Okay. As well as other entities, I
12 guess, aggregating thirty -- in thirty other actions where the
13 defendants are foreign corporations or foreign entities. As I
14 said, one of those entities, or perhaps more than one but
15 they're all listed in the same adversary proceeding, I'll refer
16 to the Freudenberg-NOK General Partnership, counsel for
17 Freudenberg has asserted at this hearing that his clients'
18 executory contract, upon which the challenged payments were
19 made, was subsequently assumed during the Chapter 11 case. If
20 that were, in fact, the case, that is, that the Court approved
21 assumption of the contract, I believe that the lawsuit would be
22 clearly lacking in merit in that it's a condition to the
23 assumption of an executory contract that all defaults under the
24 cured -- which would include, I believe as a matter of res
25 judicata, the requirement that the debtor pay in full the

1 resulting claim that would occur if the preference had been
2 avoided which, in essence, would mean that there wouldn't be a
3 basis for a preference in the first place since the claim is
4 paid in full. I just ruled on this issue and was affirmed by
5 the district court in the Credaire (ph.) Brothers case. So if,
6 in fact, that is the case, there wouldn't be a basis for
7 pursuing their lawsuit.

8 Counsel also asserts that in the agreement and as
9 part of the assumption, there is a waiver of all preference
10 claims against his clients. Neither I nor the debtor have been
11 able to examine that release but if, in fact, that release does
12 waive all preference claims or these preference claims then,
13 again, the lawsuit would not have merit.

14 As I'm about to say with regard to the other twenty-
15 nine actions, there is some issue, although it is not entirely
16 clear to me, that the debtors are facing a deadline to serve
17 the thirty complaints against the foreign defendants covered by
18 their motion. Therefore, this is not, unfortunately, the type
19 of issue that, I believe, is properly deferrable so that the
20 parties can review the underlying documents and determine
21 whether they want to proceed or not with the motion with regard
22 to Freudenberg. So I believe that it's appropriate to extend
23 the service deadline thirty days but to direct DPH to promptly
24 review with Freudenberg's counsel, Mr. McDowell of Bodman LLP,
25 the details of the assumption of the contract, the alleged

1 avoidable preferences and the asserted release to determine
2 whether they want to pursue the complaint. And I will not
3 further extend the deadline if I conclude, notwithstanding the
4 debtors' intention to pursue a request for a further
5 extension -- I will not hesitate to deny that request if I
6 believe, in fact, that the lawsuit clearly has no merit.

7 So with regard to Freudenberg, the debtors should get
8 a hearing date roughly twenty-nine or twenty-eight days from
9 now to hear their request for a further extension of the period
10 to serve. But again, I'm directing them, in the meantime, to
11 try to resolve this issue one way or the other.

12 I have objections from two other creditors that are
13 not now moot that fall into this group of foreign defendants.
14 The so-called Affinia group defendants as well as Kostal
15 Mexicana -- and Kostal Mexicana, S.A. de C.V. It's
16 acknowledged that the third defendant, the third Kostal
17 defendant, has been served and, therefore, that this motion is
18 moot as to that defendant, Kostal of America, Inc. although the
19 record is clear that Kostal of America, Inc. has preserved all
20 of its rights that don't pertain to this particular motion,
21 including, without limitation, its right to try to seek to
22 vacate the Court's prior orders extending the date to be served
23 of it.

24 There is --

25 MS. CALTON: Can I point out there's the German Valeo

1 also?

2 THE COURT: Sorry?

3 MS. CALTON: The German Valeo.

4 THE COURT: Oh, yes. They're not in the same
5 complaint but I'm --

6 MS. CALTON: Yeah.

7 THE COURT: -- including them in the Affinia group of
8 objectors --

9 MS. CALTON: Okay.

10 THE COURT: -- represented by Honigman Miller.

11 The history of this motion is somewhat lengthy and, I
12 believe, ultimately not particularly relevant to the present
13 motion for reasons I'll explain. But it is relevant in one key
14 respect. The Delphi debtors, like all Chapter 11 debtors, had
15 a two-year limitations period post-petition, under Section 546
16 of the Bankruptcy Code, to bring actions to avoid preferences,
17 fraudulent transfers and the like. Faced with that impending
18 deadline and with an analysis that showed in excess of 11,000
19 potential recipients of avoidable transfers, the debtors, with
20 their -- in consultation with their official creditors'
21 committee, determined to seek an order that would allow the
22 debtors to preserve these causes of action notwithstanding the
23 running of its statute of limitations or to -- in light of the
24 statute of limitations running -- excuse me -- but delay the
25 issuance of summonses by the clerk of the court and staying any

1 activity in the adversary actions commenced until service of
2 process and extending the deadline under Federal Rule 4(m) by
3 which the debtors would have to serve process.

4 The Court granted that request by order dated August
5 16th, 2007. Notwithstanding the number of adversary --
6 potential adversary proceedings they could bring, the debtor
7 actually brought only 742 within the statute of limitations
8 period. It, even with respect to those 742, did not actively
9 seek, as would have been required by the August 16th, 2007
10 order, to have the summonses issued and proceedings become live
11 and active for two reasons. The first, which applied at the
12 time the original motion was entered and continued for some
13 time, was the good faith belief shared by all parties in the
14 case that the debtors were on track to confirm and consummate a
15 Chapter 11 plan that would have paid unsecured creditors in
16 full or with at least sufficient value so that it would have
17 made no sense to have actually pursued the avoidance actions or
18 to have caused the defendants in those actions to incur any
19 cost in response. That situation pertained at least until
20 April of 2008. In the meantime, the Court had entered an
21 extension (sic), in light of that fact, granting a further
22 extension of the time to serve without prejudice to the
23 debtors' rights to seek further extension.

24 In April of 2008, the investors under the debtors'
25 confirmed Chapter 11 plan announced their intention not to

1 close their investment under that plan. It was not clear at
2 the time whether they could nevertheless be forced to close or
3 whether the debtors' monetary claims against them would force
4 them to close as a practical matter. In light of that
5 uncertainty, the debtors sought another deadline which was
6 granted in a second extension order dated April 30th, 2008 of
7 the time to serve 742 complaints.

8 It became clear during the course, the remaining
9 course of 2008, that the plan investors were not going to close
10 the plan or a closely similar modified plan and, instead, the
11 debtors turned their attention to a new plan. During this
12 period, the debtors also narrowed down the number of potential
13 proceedings that they determined to pursue but delayed the
14 prosecution of to 177. The rationale for -- or the primary
15 rationale for the prior extension orders and the original
16 preservation order in delaying service at that time, i.e., that
17 the pursuit of such action might not, in fact, benefit the
18 estate because it was likely that creditors would receive a
19 hundred cents or close to a hundred cents on the dollar no
20 longer applied. However, the debtors concluded that even with
21 respect to the 177 claims, there may not be a sufficient basis
22 to pursue those claims actively and force any parties to incur
23 additional cost in respect thereto.

24 Frankly, by that point in the case, and we're now
25 focusing on the fall of 2009, it was not clear whether the

1 debtors had sufficient funds to even conduct their case let
2 alone pursue adversary proceedings. And the specter of
3 conversion to Chapter 7 where a Chapter 7 trustee would be
4 pursuing the proceedings was quiet real. Consequently, the
5 debtors sought, and the Court granted, a third extension motion
6 extending a deadline under Federal Rule 4(m) to April 5, 2010.
7 And that order was issued October 2, 2009.

8 As I noted at the beginning of my ruling, when this
9 motion was filed, the present motion before me, there were
10 sixty-two adversary proceedings where the debtor was concerned
11 that service might not be completed by April 5th. Presently,
12 it appears that there are forty-two, thirty of which fall into
13 the category of foreign defendant proceedings.

14 There is, and always has been, an issue as to whether
15 any deadline for service applies with respect to the foreign
16 corporate defendants because such an issue exists, however.
17 And as for the existence of the issue, see In re Harnischfeger
18 Industries, Inc., 288 B.R. 79, 86 (Bankr. D. Del. 2003). The
19 debtors, exercising, I think, proper discretion to try to avoid
20 any question about the issue, obtained an extension under
21 Section 4(m), thus avoiding, as far as through the date of the
22 extension, any issue that the complaint should be dismissed for
23 failure to serve within an applicable deadline.

24 The debtors, when posed with this question now as to
25 whether there is, in fact, a deadline, have taken the position

1 that the prior orders imposed a deadline at the debtors' own
2 request, although albeit it was an extended one, and did so
3 under Rule 4(m). To the extent, therefore, that Rule 4(m)
4 itself does not apply to these corporate and non-individual
5 foreign defendants, it seems to me, and the debtors have
6 certainly taken this position, that it was adopted by the
7 Court's prior order as the basis for extending the deadline
8 or -- and not only extending it, but creating a new deadline.
9 It appears to me, therefore, that I should review this request
10 and the opposition to it on the basis that it is, in fact,
11 governed by Rule 4(m) notwithstanding the arguments that one
12 would make on a clean slate if there had been no prior orders
13 issued relying on 4(m) that, as adopted by some Courts, Rule
14 4(m) not only does not apply to foreign individuals, under
15 4(f), but also does not apply to foreign corporations because
16 Rule 4(h) incorporates Rule 4(f).

17 The Rule, that is, Rule 4(m), was amended in 1993 to
18 provide that the Court shall enlarge the 120-day period set
19 forth therein for good cause which was already there but also
20 that the Court, in addition, in its discretion, extend the
21 deadline in the Rule, the 120 days. The Second Circuit has
22 made it clear in its reading of the Rule, including the
23 commentary that accompanied the amendment, that Courts have
24 discretion to grant extensions even in the absent of good
25 cause. *Zapata v. City of New York*, 402 F.3d 192, 196 (2nd Cir.

1 2007).

2 One of the reasons for the amendment, as noted by the
3 Zapata case as well as the commentary for the amendment, was
4 taking into account the prejudice to the plaintiff in the event
5 that a dismissal without prejudice if good cause is not shown
6 would, in fact, prejudice the defendant because the statute of
7 limitations had run which would be the instance here. There
8 would clearly be no viability to a lawsuit filed if I were to
9 dismiss these adversary proceedings for failure to be served
10 during the deadline because the statute of limitations had
11 expired.

12 Nevertheless, the Second Circuit ruled that prejudice
13 to the plaintiff is not dispositive unlike other Courts in
14 other jurisdictions but, rather, that it is a factor to
15 consider in the exercise of the Court's discretion if, in fact,
16 there is a lack of good cause to bring the -- to obtain the
17 extension. Other Courts have considered what other factors to
18 evaluate in the absence of good cause under Rule 4(m).

19 The Second Circuit in Zapata, without actually
20 listing factors or a specific sequence of analysis that the
21 Court should undertake, clearly highlighted two other points:
22 first, the prejudice to the defendant of a further extension,
23 including the fact that the limitations period would have run;
24 and the plaintiff's diligence, although, clearly, the diligence
25 to be considered where there's not been a showing of good faith

1 basis for an extension is something less than normal diligence
2 that would support a good faith extension. At least, that
3 appears clear to me given the circumstances when one would
4 consider these factors in the first place, i.e., in the absence
5 of good cause, and the fact that, in the Zapata case, that lack
6 of diligence was shown by the plaintiff both failing to take
7 any efforts to serve the defendant during the period when the
8 deadline was in place and the plaintiff's failure to seek an
9 extension of the date to serve during that period. (502 F.3d
10 at 199)

11 Other Courts have actually listed factors. See, for
12 example, Gore v. DRBA Group, Inc., 2009 WL 884565 (S.D.N.Y.
13 March 27, 2009) at page 6; Gonzalez v. Derderian (ph.), 2007
14 U.S. Dis. LEXIS 7479 (D. R.I., January 26, 2007) at page 13 and
15 14 as well as at page 26. See also Harnischfeger Industries,
16 288 B.R. 79 at 87-88.

17 The plaintiff here would tailor -- takes the position
18 that I don't need to get into the foregoing factors because it
19 has shown good cause for an extension in that it has diligently
20 pursued service and the factors since the October 2009 order
21 was entered show a good reason why they have not served these
22 thirty foreign defendants. I believe that, recognizing as the
23 plaintiff does that serving foreign defendants takes more than,
24 in most cases, a month. I have serious reservations that, in
25 fact, there is good cause to extend the period for defendants

1 where the effort to serve did not begin until a month before
2 the April 5th deadline. It appears to me that the excuse,
3 which is that the debtor was burdened with other things, falls
4 away at least with the effectiveness of the Chapter 11 plan and
5 the commencement of cleanup litigation and approval of
6 attorneys' fees and the like which normally follows such an
7 event.

8 However, I believe that in weighing the factors in
9 the exercise of my discretion, that there is a basis to extend
10 the period to serve the objectants and those who have not
11 objected who are foreign defendants. The factors to be
12 evaluated, as set forth in the Gore case, are whether the
13 applicable statute of limitations would bar the refiled action
14 if I were to dismiss without prejudice; whether the defendant
15 had actual notice of the claims asserted in the complaint;
16 whether the defendant had attempted to conceal the defect in
17 service; and whether the defendant would be prejudiced by the
18 granting of the plaintiff's request for relief from that
19 provision. In addition, as set forth by the Rhode Island court
20 in the Gonzalez case, I believe it's also worthwhile to
21 consider whether the underlying complaint is frivolous and
22 whether, in not showing good cause, the plaintiff has been so
23 neglectful of the matter that an extension here would encourage
24 disregard for the deadline set forth in the ruling.

25 Clearly, the first factor, which is a significant

1 one, that is, it underlies the basis for the amendment to the
2 Rule 93, is in the debtors' favor here as I've said already.
3 It does no good to dismiss these actions without prejudice,
4 because the statute of limitations has run. Secondly, and this
5 is the most important consideration, I believe, with regard to
6 this motion, I believe that the proper focus is not on
7 prejudice to the defendants from the date that the adversary
8 proceedings were commenced back in 2007, but prejudice
9 resulting from a further extension. I do not believe there is
10 any prejudice resulting from a further extension that would
11 outweigh or counterbalance the prejudice to the plaintiff of
12 having the complaints dismissed. The defendants have been on
13 notice of the adversary proceedings commenced against them at
14 least since the date of this motion and will be acting
15 accordingly.

16 Moreover, to the extent there is prejudice as a
17 result of the Court's prior orders granting extensions, it
18 would seem to me that that prejudice is outweighed by two
19 factors. First, the orders were issued and the debtors, I
20 believe, reasonably relied on them. And more important, my
21 ruling with regard to prejudice here, I believe, has no
22 collateral estoppel or res judicata effect with regard to any
23 arguments that the defendants will make in the adversary
24 proceedings with regard to any inability that they had before
25 they knew of the complaints against them -- I'm sorry -- any

1 ability that they have to assert affirmative defenses based on
2 the disappearance of witnesses or evidence before the
3 defendants knew of the existence of the complaints against
4 them.

5 Further, the Court's weighing of these factors in the
6 exercise of its discretion on this motion, I believe, would not
7 have collateral estoppel or res judicata effect with regard to
8 any attempt by these defendants or any other defendant, to seek
9 to vacate any of the Court's prior orders, including the
10 original one in August of 2007, allowing the complaints to be
11 filed under seal.

12 Therefore, I believe that the prejudice that should
13 be focused on here, again, is future prejudice, coupled with an
14 analysis of whether there was any meaningful prejudice during
15 the last few months, during the operative period of the last
16 extension order. I don't believe that there has been prejudice
17 during that period and, again, that there is any prejudice
18 based on an extension of time as requested by the debtor.

19 Clearly, there's been no attempt to conceal a defect
20 in service by these objectors, so that factor does not weigh in
21 favor of the plaintiff here. But it's really only a factor
22 that does weigh in favor of the plaintiff if the contrary is
23 shown. It doesn't particularly help the defendant.

24 The objectors have contended that the lawsuit is also
25 essentially frivolous against them. They have done that on two

1 different grounds. I've already dealt with the Freudenberg
2 defendants. And I believe that potentially, if what counsel
3 has represented to me is true, the lawsuit would be frivolous,
4 and therefore, on that basis, I will grant only a thirty-day
5 extension on the terms that I explained earlier.

6 The other basis, as asserted by the other defendants,
7 is that the debtors obtained an order authorizing them to
8 abandon causes of action, including, as asserted by the
9 defendants, these causes of action -- causes of action in
10 respect of payments to suppliers. I believe that this issue is
11 not, based on the record before me, what I could call as a
12 frivolous -- or points to the complaint being frivolous, which
13 I think is the only basis where this type of factor should be
14 considered in this context, which is whether there should be an
15 extension of the time to serve or a complaint should
16 alternatively be effectively dismissed forever because of
17 failure to serve timely. I am reluctant to cause that to occur
18 without a full record on what was, in fact, sought under the
19 order granting the debtor the right to abandon, what notice was
20 given, and what was argued to the Court at that time. I
21 believe that it is more appropriately taken up in the context
22 of a motion to dismiss as opposed to a motion to preclude
23 additional time to serve and effectively to have the case be
24 dismissed because of a missed deadline to serve.

25 That leaves the last point, which is whether the

1 plaintiff here has been so lacking in diligence that the Court
2 should not exercise its discretion and preserve the cause of
3 action. Clearly, the defendants -- I'm sorry -- clearly the
4 plaintiff here has done considerably more than the plaintiff
5 did in the Zapata case. The other cases cited to me by the
6 defendant objectors for the proposition that the plaintiff's
7 lack of diligence should justify the effective dismissal of
8 these lawsuits also more closely resemble the facts in Zapata,
9 that is, they involved instances where the plaintiff did
10 nothing or went through a sham process of service or -- and/or
11 did not seek an extension of time before the limitations period
12 expired.

13 Here, while it is clear to me that the efforts begun
14 by the debtors could not be completed with regard to the
15 remaining foreign objectants within the deadline, the debtors
16 did seek -- I'm sorry -- DPH did seek an extension within the
17 deadline period and did, I believe, commence the effort to
18 serve the foreign defendants in good faith. Moreover, this
19 deadline was self-imposed. This is, I believe, a unique
20 context where they have taken upon themselves to impose a
21 deadline under Rule 4(m) when, in fact, it may well not apply
22 given 4(m)'s reference to 4(f) and 4(h)'s incorporation of
23 4(m).

24 Therefore, in exercising my discretion, I'll permit
25 them one final extension, barring any extraordinary efforts by

1 the defendants to thwart service in the future.

2 So, counsel for DPH should submit, I think, three
3 orders: one granting the request for thirty days in the first
4 two categories; one consistent with my ruling with regard to
5 the Freudenberg defendants; and one with regard to the other
6 foreign defendants. Again, my ruling is without prejudice, and
7 specifically, I believe, without claim or issue preclusion
8 effect with regard to motions to vacate my prior orders or
9 arguments that defendants may make that the Court should adopt
10 various burden-shifting mechanisms, if, in fact, the ceiling of
11 the complaints preclude the defendants from asserting
12 administrative defenses because of the effect that it had on
13 their ability to marshal evidence. But I believe those issues
14 are more properly taken up in that context rather than in this
15 context, with regard to a service deadline.

16 MS. CALTON: Can I attempt to clarify a statement
17 that the Court made?

18 THE COURT: Sure.

19 MS. CALTON: Early on in the opinion, you said that
20 the motion to extend the April 2000 motion was to preserve
21 these claims, and I'm hoping the Court isn't making any
22 judgment on the abandonment issue that it wasn't to preserve
23 some and abandon others?

24 THE COURT: Oh, no, I'm not. The abandonment -- and
25 I should say, when I'm talking about without prejudice, that's

1 also without prejudice to anything on the merits, including
2 that these claims have been abandoned.

3 MS. CALTON: Okay.

4 THE COURT: Yeah. But no. I meant that only in the
5 sense that it was meant to extend the time -- the deadline to
6 serve because without that extension, the 546 would apply.

7 UNIDENTIFIED SPEAKER: Excuse me, Your Honor?

8 THE COURT: Okay. Thank you.

9 MR. FISHER: Thank you, Your Honor.

10 MR. GEOGHAN: Thank you, Your Honor.

11 MR. HUTCHINSON: Thank you.

12 (Whereupon these proceedings were concluded at 12:52 p.m.)

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I N D E X

R U L I N G S

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB
AAERT Certified Electronic Transcriber (CET**D-486)

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Date: April 6, 2010